Supreme Court, U.S.
FILED

JUL 14 2010

OFFICE OF THE CLERK

No. 10-83

IN THE

Supreme Court of the United States

GARY E. PEEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JEROLD S. SOLOVY*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60611
(312) 222-9350
jsolovy@jenner.com

JESSIE K. LIU
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

* *Counsel of Record*

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, the government can ban non-obscene materials that do not depict actual children and which therefore are not intrinsically related to the sexual abuse and exploitation of children.

2. Whether, consistent with the *Ex Post Facto* Clause, the government can ban materials that previously enjoyed the protection of the First Amendment.

PARTIES TO THE PROCEEDING

The parties below were (1) Gary E. Peel and (2) the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6
I. The Decision of the Court of Appeals Conflicts with This Court's Decision in *Ashcroft v. Free Speech Coalition* 7
A. As Applied to Petitioner, Section 2252A(a)(5)(B) Violates the First Amendment 7
B. The Affirmative Defense Does Not Save the Statute from Constitutional Challenge. 11
II. The Decision of the Court of Appeals Raises Serious *Ex Post Facto* Concerns 13
III. The Court of Appeals' Decision Has Potentially Wide-Ranging Effects. 15
CONCLUSION 17

Appendix A
United States v. Peel, 595 F.3d 763 (7th Cir. 2010) 1a

Appendix B
United States v. Peel, No. 06-CR-30049-WDS (S.D. Ill. July 23, 2007) 23a

Appendix C
Verdict, *United States v. Peel*, No. 06-CR-30049-WDS (S.D. Ill. Mar. 23, 2007) 37a

Appendix D
Judgment, *United States v. Peel*, No. 06-CR-30049-WDS (S.D. Ill. Nov. 19, 2007) 39a

Appendix E
Order denying rehearing, *United States v. Peel*, No. 07-3933 (7th Cir. Mar. 15, 2010) 45a

TABLE OF AUTHORITIES

CASES

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 7, 8, 9, 10, 11, 12, 16, 17

Miller v. California, 413 U.S. 15 (1973) 7

New York v. Ferber, 458 U.S. 747 (1982) 7, 8

Osborne v. Ohio, 495 U.S. 103 (1990) 9

United States v. Juvenile Male, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2010) (No. 09-940) 13

United States v. Juvenile Male, 590 F.3d 924 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2010) (No. 09-940) 14, 15

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 9, cl. 3 2

U.S. Const. amend. I 1

18 U.S.C. § 2252A(a)(5)(B) 2, 4, 11

18 U.S.C. § 2252A(c) 1, 11, 16

18 U.S.C. § 2252A(c)(1)(B) 11

18 U.S.C. § 2256(2)(A) 16

28 U.S.C. § 1254(1) 1

Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Title I, § 101(a), 110 Stat. 3009-26, 18 U.S.C. § 2251 *et seq.* 8

Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 3

Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Title III, 104 Stat. 4816 3

Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) 3

Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 590, 42 U.S.C. § 16901 *et seq.* (2006) 13

PETITION FOR A WRIT OF CERTIORARI

Gary E. Peel respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. App. 1a-22a) is reported at 595 F.3d 763. The order of the Seventh Circuit denying the combined petition for rehearing and rehearing en banc (Pet. App. 45a-46a) is unreported. The pertinent orders and opinions of the district court are unreported and are reproduced at Pet. App. 23a-44a.

JURISDICTION

The Seventh Circuit issued its decision on February 12, 2010. On March 15, 2010, the Seventh Circuit denied Petitioner's timely filed combined petition for rehearing and rehearing en banc. Justice Stevens extended the time for filing a petition for certiorari to August 12, 2010. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

Section 2252A(c), Title 18, United States Code, provides:

> (c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that —
>
> (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
>
> (B) each such person was an adult at the time the material was produced; or
>
> (2) the alleged child pornography was not produced using any actual minor or minors.

Article I, Section 9, Clause 3 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE CASE

On March 23, 2007, a federal jury found Petitioner Gary E. Peel guilty of, *inter alia*, two counts of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The photographs that Petitioner was convicted of possessing were thirty-three-year-old Polaroids that he had taken in his home state of Illinois of a sixteen-year-old woman with whom he had been having a consensual sexual relationship. At the time, in 1974, the age of consent in Illinois was sixteen.

Moreover, at the time the pictures were taken, there was no federal child pornography law. It was not until the late 1970s that Congress passed the

Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978). That statute made it illegal to use a minor to engage in sexually explicit conduct for the purpose of producing a visual image of such conduct knowing that it would be transported in interstate or foreign commerce, but did not prohibit the mere possession of child pornography. The Act defined "minor" as an individual under the age of sixteen.

Seven years later, Congress enacted the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204, which changed the definition of "minor" to any individual under the age of eighteen. Like the previous legislation, this statute did not apply to mere possession of child pornography.

It was not until 1990 that Congress extended the federal child pornography laws to cover possession of sexually explicit images of minors. *See* Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Title III, 104 Stat. 4816. As a result, Petitioner's possession of the photographs became illegal under federal law for the first time some sixteen years after they were taken.

In 2006, Petitioner was indicted for possessing the photographs. He argued at trial that he could not be convicted of possession of child pornography because the subject of the photographs was an adult at the time they were taken. The district court took judicial notice of the fact that the age of consent for sexual activity in Illinois in 1973 and 1974 was sixteen, and so instructed the jury. Nonetheless, Petitioner was found guilty, and the district court

entered a judgment of conviction against him on November 19, 2007.

Petitioner filed a notice of appeal on December 4, 2007. After initial briefing by both counsel and Petitioner *pro se*, the court of appeals struck all previously filed briefs and appointed new counsel. The court ordered counsel to brief several issues, including the following:

> With respect to Mr. Peel's convictions for possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) —
>
> a. Whether the government's evidence was sufficient to support Mr. Peel's convictions where the images in question were sexually explicit photographs of a sixteen-year-old female taken prior to the enactment of a federal criminal statute regulating child pornography, as defined to cover any person under the age of eighteen years?
>
> b. Whether Mr. Peel complied with the procedural requirements for asserting the affirmative defense available under 18 U.S.C. § 2252A(c), and if not, what is the effect of such noncompliance?

Section 2252A(c) sets forth an affirmative defense to the charge of possession of child pornography where "the alleged child pornography was produced

using an actual person or persons engaging in sexually explicit conduct" and "each such person was an adult at the time the material was produced," or "the alleged child pornography was not produced using any actual minor or minors."

In his appeal, Petitioner argued that the affirmative defense entitled him to a judgment of acquittal on the child pornography counts. He asserted that although he did not file a formal notice of his intention to invoke the affirmative defense, as the statute requires, he should not be deemed to have waived that defense, because he consistently maintained at trial that the subject of the photographs was an adult at the time they were taken, and thus gave the government ample notice that he planned to contest the child pornography charges on this ground. Substantively, Petitioner contended that "at the time the material was produced," in 1974, the subject was an "adult" under both state and federal law, as she was above the age of consent in Illinois, and there was no federal child pornography statute.

The court of appeals affirmed Petitioner's child pornography convictions. It characterized Petitioner's argument as asserting that the affirmative defense "grandfather[s] the possession of pornography that was legal when it was created." Pet. App. 11a. The court then rejected that interpretation of the affirmative defense:

> The history makes clear that the affirmative defense was not added to the statute in order to grandfather

> pornography created before the definition of a child was changed from younger than 16 to younger than 18. It was added to exculpate child pornography made with adult rather than child models, at a time when the Supreme Court had not yet ruled that the making of such pornography could not constitutionally be punished, and therefore at a time when Congress thought it could place the burden of proof concerning the age of the model used in producing the pornography on the defendant rather than on the government.

Pet. App. 14a. Despite its acknowledgment that the affirmative defense was "added to exculpate child pornography made with adult rather than child models," the court of appeals did not address Petitioner's assertion that the subject of the photographs in his case was, in fact, an adult at the time they were taken. Pet. App. 10a-15a.

REASONS FOR GRANTING THE WRIT

This is a child pornography case that does not involve a child. Even though it was undisputed at trial and on appeal that the photographs Petitioner was convicted of possessing depicted a young woman who was above the age of consent for sexual activity, and therefore recorded no child sexual abuse or exploitation, the court of appeals affirmed Petitioner's conviction for possession of child pornography. The decision conflicts with this Court's

decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which made clear that non-obscene materials that do not depict the sexual victimization of actual children enjoy First Amendment protection. It also raises serious *ex post facto* concerns.

I. The Decision of the Court of Appeals Conflicts with This Court's Decision in *Ashcroft v. Free Speech Coalition*.

A. As Applied to Petitioner, Section 2252A(a)(5)(B) Violates the First Amendment.

It is well-established that child pornography does not enjoy the protection of the First Amendment. In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that although adult pornography can be banned only if obscene, child pornography can be proscribed whether or not obscene under the definition set forth in *Miller v. California*, 413 U.S. 15 (1973). The Court explained that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," and that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." 458 U.S. at 757-58. The distribution of child pornography can be banned, the Court held, because it is "intrinsically related to the sexual abuse of children" insofar as it stands as a permanent record of the children's abuse and creates incentives for the production of material that requires the sexual exploitation of children. *Id.* at 759. Thus, the *Ferber* Court's ruling upholding the ban on child pornography was rooted in "the State's particular and more compelling interest in

prosecuting those who promote the sexual exploitation of children." *Id.* at 761.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), this Court made clear that the First Amendment does not permit the prohibition of child pornography whose production does not involve child sexual abuse and exploitation. The statute at issue in *Free Speech Coalition*, the Child Pornography Prevention Act of 1996 ("CPPA"), Pub. L. No. 104-208, Div. A, Title I, § 101(a), 110 Stat. 3009-26, 18 U.S.C. § 2251 *et seq.*, extended the federal child pornography laws to sexually explicit images that appeared to depict real minors but were produced using youthful-looking adults or computer graphics.

This Court observed that "[b]y prohibiting child pornography that does not depict an actual child, the [CPPA] goes beyond *New York v. Ferber*, which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process." *Id.* at 240 (citation omitted). The Court explained that *Ferber* upheld a ban on the prohibition on the production, distribution, and sale of child pornography because, first, as a permanent record of a child's abuse, the continued circulation of the images would harm the child depicted in them, and second, the State had an interest in closing the distribution network for child pornography, since the traffic in such images was an economic motive that encouraged its production. *Id.* at 249-50 (citing *Ferber*, 458 U.S. at 759-60). "Under either rationale, the speech had what the Court in effect held was a

proximate link to the crime from which it came." *Id.* at 250.

The Court then considered *Osborne v. Ohio*, 495 U.S. 103 (1990), which held that the same governmental interests articulated by the *Ferber* Court justified a ban on the possession of pornography produced by using actual children. Although the *Osborne* Court "noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors," the *Free Speech Coalition* Court said, it "anchored its holding in the concern for the participants, those whom it called the 'victims of child pornography.'" 535 U.S. at 250. The Court emphasized that *Osborne* "did not suggest that, absent this concern, other governmental interests would suffice." *Id.*

Applying these principles to the CPPA, the Court rejected the argument that child pornography that was not produced using real children nonetheless could be banned because it caused indirect harms.

> In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily

> follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

Id. (internal citations omitted). These reasons "in support of limiting the freedom of speech," the Court held, "have no justification in our precedents or in the law of the First Amendment." *Id.* at 256. Accordingly, it struck down the CPPA as violative of the First Amendment.

The court of appeals' affirmance of Petitioner's child pornography conviction in the face of uncontroverted evidence that the subject of the photographs was an adult at the time of their production runs afoul of *Ashcroft v. Free Speech Coalition*. Unlike the images in *Ferber*, Petitioner's photographs are not "intrinsically related to the sexual abuse of children." 458 U.S. at 759. Indeed, they have nothing at all to do with child sexual abuse, as they were taken in the course of a relationship between consenting adults. And like the images at issue in *Free Speech Coalition*, the thirty-year-old Polaroids Petitioner was convicted of possessing "record[ed] no crime" and "create[d] no victims by [their] production." 535 U.S. at 250. Therefore, they cannot be banned consistent with the First Amendment. The court of appeals' decision to the contrary conflicts squarely with *Free Speech Coalition*, and this Court should hear and reaffirm this well-established precedent.

B. The Affirmative Defense Does Not Save the Statute from Constitutional Challenge.

The affirmative defense found at 18 U.S.C. § 2252A(c) does not render § 2252A(a)(5)(B) constitutional as applied to Petitioner. As an initial matter, it is far from clear that such a defense can save a statute from constitutional challenge. In *Free Speech Coalition*, the government defended the CPPA based in part on an affirmative defense available under the statute that allowed a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. 535 U.S. at 255. This Court observed that the "Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Id.* It noted that "[a]n affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." *Id.* That certainly was true in this case.

Even if an affirmative defense could save a statute from constitutional challenge, the court of appeals' decision essentially eviscerated the defense. Petitioner interpreted the affirmative defense to permit him to prove that the subject of the photographs was an "adult at the time the material was produced." 18 U.S.C. § 2252A(c)(1)(B). Such a showing would demonstrate that the production of those photographs did not implicate child sexual abuse or exploitation that would justify banning

them despite their non-obscene nature. Consistent with that interpretation of the affirmative defense, Petitioner maintained at trial, and the district court agreed, that the subject of the photographs at issue was above the age of consent at the time the pictures were taken. On appeal, Petitioner renewed his assertion that the subject of the photographs was an "adult" at the time they were produced, and argued that the affirmative defense therefore relieved him of criminal liability.

The court of appeals failed to address this argument, however. To be sure, it aptly observed that "the production of non-obscene pornography in which no child was involved cannot constitutionally be prohibited, because there is no sexual abuse in such a case, and only the presence of that abuse . . . justifies the suppression of pornography that does not cross the line to obscenity." Pet. App. 13a (citing *Free Speech Coalition*, 535 U.S. at 250-51). But rather than confronting Petitioner's argument that "no child was involved" in the pictures in this case, the court of appeals set up a straw man argument (that the affirmative defense was meant to preserve the legality of sexually explicit materials that were legal when made) that it then proceeded to knock down. In doing so, it exacerbated the First Amendment concerns raised by this case. This Court should not leave this constitutionally problematic ruling in place.

II. The Decision of the Court of Appeals Raises Serious *Ex Post Facto* Concerns.

The court of appeals' decision also raises significant *ex post facto* concerns. When Petitioner took the photographs at issue in 1974, there was no child pornography law. Congress' first child pornography statute, enacted in 1977, extended only to the production and distribution of sexually explicit images of individuals under the age of sixteen. Not until 1983 did Congress amend the child pornography statute to apply to sexually explicit images of individuals under the age of eighteen. And it was not until 1990 that Congress criminalized the mere possession of child pornography. With the passage of that statute, Petitioner became subject to criminal prosecution for possessing materials that previously were not only legal, but which, in light of *Ferber*, he had every reason to believe were constitutionally protected.

This Court considered an analogous situation in *United States v. Juvenile Male*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2010) (No. 09-940). That case involved a defendant who was adjudicated a delinquent after he pled "true" to non-consensual sexual acts with a ten-year-old child. After his adjudication and sentencing, Congress passed the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, 120 Stat. 590, 42 U.S.C. § 16901 *et seq.* (2006), which requires individuals who have been adjudicated delinquent for certain serious sex offenses to register as sex offenders and to keep their registrations current in each jurisdiction where they live, work, and attend school. The Attorney General

subsequently issued an interim rule that SORNA's requirements apply to "all sex offenders," even those adjudicated delinquent after the passage of the statute. After the district court in *Juvenile Male* ordered the defendant to register as a sex offender and to keep his registration current, he appealed.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the registration order violated the *Ex Post Facto* Clause. The court of appeals reasoned that the registration requirement imposed retroactive punishment insofar as it "makes public information about sex offenders that would otherwise permanently remain confidential and exposes persons who were adjudicated delinquent years before to public humiliation and ignominy for the first time." *United States v. Juvenile Male*, 590 F.3d 924, 935 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2010) (No. 09-940). Thus, "individuals who *twenty or thirty years ago* pled true to acts of juvenile delinquency — and who did so with the expectation that their adjudication would remain confidential — may, decades later, be required to publicly expose that information to friends, family, colleagues, and neighbors." *Id.* (emphasis in original). The government filed a petition for certiorari, but this Court reserved further proceedings pending a response to a certified question from the Supreme Court of the State of Montana.

This case presents *ex post facto* concerns analogous to those in *Juvenile Male*. Petitioner took the photographs at issue, and kept them for years, "with the expectation" that they were protected by

the First Amendment, because they depicted non-obscene sexually explicit conduct by an adult. *Id.* The subsequent criminalization of possession of child pornography, and the redefinition of child pornography to include sexually explicit images of sixteen- and seventeen-year-olds who had achieved the age of majority at the time the photographs were taken, subjected him to prosecution, "public humiliation and ignominy for the first time." *Id.* The Court should grant the petition for a writ of certiorari in this case or, because of the similarities between this case and *Juvenile Male*, hold it pending a ruling on the petition in that case.

III. The Court of Appeals' Decision Has Potentially Wide-Ranging Effects.

The facts of Petitioner's case are unusual and perhaps even unique. He took nude photographs of a young adult woman with whom he was having a consensual sexual relationship and kept them for more than thirty years, during which time a federal law classifying the pictures as child pornography was passed, and was finally prosecuted for possessing them three decades after their creation. But the decision below has effects far beyond Petitioner's case.

First, the court of appeals' decision creates a strange situation in which some individuals may legally engage in sexual activity (or even marry) but may not photograph themselves doing so. This Court alluded to this incongruity in *Free Speech Coalition*, in which it noted that the CPPA banned images of individuals who appear to be under eighteen. "This is

higher than the legal age of marriage in many states, as well as the age at which persons may consent to sexual relations." 535 U.S. at 247 (citing sources). Indeed, because the child pornography statutes prohibit images of "simulated" as well as actual sex, *see* 18 U.S.C. § 2256(2)(A), it is even possible that it would be legal for an actor above the statutory age of consent to engage in *real* sexual activity, but illegal for him to film (or possess as film of) himself simulating sex. Such a reading of the statute is wholly unsupported by the First Amendment or this Court's precedents.

Second, it is entirely possible, and indeed probable, that the court of appeals' decision makes illegal significant quantities of artistic and scientific works that reside not only in libraries, museums, movie studios, and other institutions, but in home DVD collections, on the Internet, and on personal computers and an ever-growing number of electronic hand-held devices. As this Court observed in *Free Speech Coalition*, "teenage sexual activity and the sexual abuse of children . . . have inspired countless literary works" that have substantial social value. 535 U.S. at 247 (citing Shakespeare's *Romeo and Juliet* and numerous contemporary films). Such works may include sexually explicit images of actors and models who were adults under the applicable law at the time of production but are now classified as minors as a result of subsequent statutory changes. Unless the possessors of this material can invoke the affirmative defense in 18 U.S.C. § 2252A(c), they will be "subject to severe punishment without inquiry into the work's

redeeming [social] value." 535 U.S. at 248. As this Court held in *Free Speech Coalition*, that would be inconsistent with the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a writ of certiorari or, in the alternative, hold it pending a ruling on the petition for a writ of certiorari in *United States v. Juvenile Male*, No. 09-940.

Respectfully submitted,

JEROLD S. SOLOVY*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60611
(312) 222-9350
jsolovy@jenner.com

JESSIE K. LIU
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

July 14, 2010

* *Counsel of Record*

INDEX

Appendix A
United States v. Peel, 595 F.3d 763 (7th Cir. 2010) 1a

Appendix B
United States v. Peel, No. 06-CR-30049-WDS (S.D. Ill. July 23, 2007) 23a

Appendix C
Verdict, *United States v. Peel*, No. 06-CR-30049-WDS (S.D. Ill. Mar. 23, 2007) 37a

Appendix D
Judgment, *United States v. Peel*, No. 06-CR-30049-WDS (S.D. Ill. Nov. 19, 2007) 39a

Appendix E
Order denying rehearing, *United States v. Peel*, No. 07-3933 (7th Cir. Mar. 15, 2010) 45a

Appendix A

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Gary E. PEEL, Defendant-Appellant.

No. 07-3933.

Argued Dec. 10, 2009.
Decided Feb. 12, 2010.

Before POSNER, MANION, and HAMILTON, Circuit Judges.

POSNER, Circuit Judge.

The defendant was convicted by a jury of bankruptcy fraud, obstruction of justice, and possession of child pornography, and was sentenced to 144 months in prison. His appeal challenges both the convictions and the sentence.

The events giving rise to this case go back a long way. In 1967 the defendant married. Seven years later he began an affair with his wife's 16-year-old sister. In the course of the affair, which lasted several months, he took nude photographs of her that the jury found were sexually explicit within the meaning of the child-pornography statute; he does not contest that finding. In response to her later

request for the pictures, he gave her some of them (which she then destroyed) and, without telling her, retained others in a file in his office.

In June 2003 the Peels divorced, and agreed to a marital settlement. The following year Peel filed suit in an Illinois state court to vacate the settlement. The year after that he filed for bankruptcy and asked the bankruptcy court to discharge the financial obligations to his ex-wife that the settlement agreement had imposed. She opposed the discharge and filed a claim for the money that he owed her under the settlement. "Discharge" may not be the right word for what he was seeking-"abandonment" probably is better-because his debt to her under the settlement probably was not dischargeable in bankruptcy under the Bankruptcy Code as it then read. 11 U.S.C. §§ 523(a)(5), (15)(A), (B) (2005); *In re Crosswhite,* 148 F.3d 879, 881-82 (7th Cir. 1998); *In re Reines,* 142 F.3d 970, 972-73 (7th Cir. 1998); *In re Daulton,* 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992). (Under the current Code, it almost certainly would not be dischargeable. See 11 U.S.C. §§ 101(14A), 523(a)(5), (15).) So he had to persuade her to drop the claim.

Negotiations looking to compromise it were predictably acrimonious and in the course of them the defendant told her about the nude photographs of her sister and said that "these would be ... an item that would likely get out into the public if we didn't stop this escalating battle of putting things in the newspaper." He backed up his threat by placing

photocopies of the photographs in her mailbox. She complained to the police and later to federal authorities, and at their direction made recorded phone calls to the defendant. The conversations confirmed that he was blackmailing her with the photographs. He faxed her a draft of a settlement agreement that she had previously rejected, adding a provision requiring him to return certain unidentified photographs to her. They met and he showed her the originals. The meeting was recorded, and included an exchange in which she said: "So you resort to blackmailing me?" He replied: "There's nothing left. I'm down to: no kids; no grand-kids; no money." "And, so," she responded, "blackmailing me with photographs.... Okay, but as long as I go ahead and sign these settlement agreements...." He replied: "Right then you have...." And she: "... you'll give me the photographs...." And he: "On the spot."

He was convicted as we said of both bankruptcy fraud and obstruction of justice. He argues that to convict him of both violated the double jeopardy clause of the Fifth Amendment, because one offense is included in the other. It might seem that there would be no issue of double jeopardy in a case in which multiple convictions occurred in the same trial, *Williams v. United States,* 150 F.3d 639, 641 (7th Cir. 1998); *United States v. Masters,* 978 F.2d 281, 285 (7th Cir. 1992), since the purpose of the clause is " 'to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' " *Missouri v. Hunter,* 459 U.S. 359, 365-68, 103 S. Ct.

673, 74 L.Ed.2d 535 (1983), quoting *Burks v. United States,* 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978). But the Supreme Court has held that "with respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause ... prevent[s] ... the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter, supra,* 459 U.S. at 366, 103 S. Ct. 673; *see also Ohio v. Johnson,* 467 U.S. 493, 499, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984) ("the final component of double jeopardy-protection against cumulative punishments-is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *United States v. Konopka,* 409 F.3d 837, 838-39 (7th Cir. 2005); *United States v. Fischer,* 205 F.3d 967, 969 (7th Cir. 2000); *United States v. Hector,* 577 F.3d 1099, 1100-01 (9th Cir. 2009); *United States v. Miller,* 527 F.3d 54, 70-73 (3d Cir. 2008). Some of the Justices disagree with this extension of the double jeopardy clause-see the discussion of their views in *White v. Howes,* 586 F.3d 1025, 1032-35 (6th Cir. 2009)-but for now, at least, it is the law and binds us.

So are bankruptcy fraud and obstruction of justice committed in a bankruptcy proceeding the same offense for purposes of double jeopardy? Bankruptcy fraud requires, so far as relates to this case, that the defendant "knowingly and fraudulently ... offers compensation ... for ... forbearing to act in any case under" the Bankruptcy Code. 18 U.S.C. § 152(6). ("[F]orbearing to act" in this case would mean his ex-wife's abandoning her bankruptcy claim.)

Obstruction of justice requires that the defendant "corruptly obstructs, influences, or impedes any official proceeding, or attempts to do so." 18 U.S.C. § 1512(c)(2). So the elements of the offenses are different, as the government points out. But since a bankruptcy proceeding is an "official proceeding," within the meaning of the obstruction of justice statute, 18 U.S.C. § 1515(a)(1)(A) ("the term 'official proceeding' means ... a proceeding before ... a bankruptcy judge"), the defendant's conviction for having attempted fraudulently to influence the bankruptcy proceeding by blackmailing his ex-wife into agreeing to drop her claim convicted him of obstruction of justice as well.

The test for "whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Missouri v. Hunter, supra,* 459 U.S. at 366, 103 S. Ct. 673, quoting *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The test was flunked here because convicting Peel of obstruction of justice did not require proof of any fact that didn't have to be proved to convict him of bankruptcy fraud. It was thus a lesser-included offense of bankruptcy fraud and the *Blockburger* test makes clear, and many cases hold, that to punish a person for a lesser-included offense as well as the "including" offense is double jeopardy unless Congress intended the double punishment. *Rutledge v. United States,* 517 U.S. 292, 297-98 and n.6, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996); *United States v. Fischer, supra,* 205 F.3d at 969; *United States v. Xavier,* 2 F.3d 1281, 1291 (3d Cir. 1993).

The government does not argue that Congress intended that.

This is like a case in which a person is tried for both murder and attempted murder. The elements are different, but since conviction for murder automatically convicts the defendant of attempted murder (for there can be no murder without attempting the deed), the defendant cannot be convicted of both crimes. See, e.g., *People v. Davidson,* 159 Cal. App. 4th 205, 70 Cal. Rptr. 3d 913, 917-18 (2008). There is an exception for cases in which the defendant was convicted of the lesser-included offense before he could have been prosecuted for the greater one, as when the defendant is convicted of attempted murder and later his victim dies. In such a case he can be tried for murder. *People v. Carrillo,* 164 Ill. 2d 144, 207 Ill. Dec. 16, 646 N.E.2d 582, 584-85 (1995). The exception has no application to this case, which must therefore be remanded with directions that the judge vacate one of the two convictions.

The defendant argues that his conviction for obstruction of justice is the one that should be vacated, even though it carries the higher statutory maximum sentence, because it is a lesser-included offense of bankruptcy fraud. It is lesser in the sense of having fewer elements, see *United States v. Smith,* 34 F.3d 514, 517-18 (7th Cir. 1994); *United States v. Harley,* 990 F.2d 1340, 1343-44 (D.C. Cir. 1993), because one can commit obstruction of justice without committing bankruptcy fraud but not

bankruptcy fraud without committing obstruction of justice. That is the only sense of "lesser" that matters under the *Blockburger* test: that offense *A* has elements *a, b, c,* and offense *B* has elements *a, b, c,* and *d,* so that conviction of *B* automatically convicts the defendant of *A* as well. The remedy is to eliminate the doubleness. But which conviction must be vacated is not dictated by the Constitution. It is a matter committed to the trial judge's discretion because functionally it is a decision concerning the length of the defendant's sentence. *Ball v. United States,* 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); *Lanier v. United States,* 220 F.3d 833, 841-42 (7th Cir. 2000); *United States v. Fischer, supra,* 205 F.3d at 970 n.2; *United States v. Hector, supra,* 577 F.3d at 1103-04; *United States v. Miller, supra,* 527 F.3d at 74. But usually it's the conviction carrying the lesser penalty that is vacated. As we noted in *Lanier,* it would be paradoxical to give the defendant a shorter sentence than he would have received had the government not also charged him with the less serious offense. 220 F.3d at 842.

What is true is that in a case in which the lesser-included offense has fewer elements *and* is the less serious offense, vacating the sentence for the graver offense would be an abuse of discretion: imagine convicting a person of attempted murder and of murder and punishing him only for the attempt. This is not such a case; the lesser-included offense of obstruction of justice is the graver offense.

The defendant argues that it was not proved beyond

a reasonable doubt that he had committed either bankruptcy fraud or obstruction of justice. Regarding the obstruction charge, he argues that he did not act "corruptly" because he was prepared to disclose the photographs to the bankruptcy court. That is a distortion of the deal he tried to make with his ex-wife. The deal was that she would abandon her claim and in exchange would get the photographs. He expected her to keep them secret from the world, including the bankruptcy court, not only because they were an embarrassment but also because if the bankruptcy judge discovered that the ex-wife had been blackmailed into dropping her claim he would be certain to notify the authorities and the deal would collapse. Peel's expectation of secrecy was disappointed because his ex-wife went to the police. So there was no actual obstruction of justice, merely an attempt, but the statute punishes the attempt equally with the achieved obstruction.

His main argument against the conviction for bankruptcy fraud is that his object was to get his ex-wife to drop her opposition to his state-court suit to dissolve the marital agreement. That was one object but he also wanted her claim in the bankruptcy proceeding dismissed because in all likelihood it was not dischargeable in bankruptcy.

He further argues that bankruptcy fraud does not extend to fraud committed in an "adversary proceeding" in bankruptcy. The term refers to proceedings to resolve claims within the overall bankruptcy case; a proceeding to object to the

discharge of a debt or to determine its dischargeability is a typical adversary proceeding. Fed. R. Bankr. P. 7001(4), (6); see *Zedan v. Habash*, 529 F.3d 398, 402-03 (7th Cir. 2008); *In re Marchiando*, 13 F.3d 1111, 1113-14 (7th Cir. 1994); *In re Duncan*, 448 F.3d 725, 726 (4th Cir. 2006). An adversary proceeding is thus part of the bankruptcy but it is not the bankruptcy case itself, as illustrated by the fact that the dismissal of an adversary proceeding is an appealable final order even though the bankruptcy case continues. *In re Marchiando, supra*, 13 F.3d at 1113-14.

Bankruptcy fraud is fraud committed "in any case under title 11" of the U.S.Code, 18 U.S.C. § 152(6), that is, under the bankruptcy code; and we cannot find any authority on whether *all* adversary proceedings in bankruptcy are "case[s] under title 11" within the meaning of the section. The fact that some adversary proceedings can be heard in state court, 28 U.S.C. §§ 1334(a), (b); 1 *Collier on Bankruptcy* ¶ 3.01[1] (15th ed.2009), and that in many such proceedings no issue of bankruptcy law is presented (often an adversary proceeding is a tort or contract suit governed by state law, see, e.g., *In re Teknek, LLC*, 512 F.3d 342, 345 (7th Cir. 2007); *Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 771 (7th Cir. 2004); *SNA Nut Co. v. Haagen-Dazs Co.*, 302 F.3d 725, 729 (7th Cir. 2002); *In re Caldor Corp.*, 303 F.3d 161, 163-64 (2d Cir. 2002)), suggests a negative answer. But a number of cases suggest (none to the contrary) that at least fraud in an adversary proceeding involving

dischargeability is bankruptcy fraud. *In re Kallstrom,* 298 B.R. 753, 758-59 and n.25 (10th Cir. BAP 2003); *In re Parker,* 2003 WL 21703528, at *3 (Bankr. N.D. Ga. July 18, 2003); *In re Taylor,* 190 B.R. 413, 416 n.3 (Bankr. D. Colo. 1995); *In re Nicolosi,* 86 B.R. 882, 887-88 (Bankr. W.D. La. 1988); 10 *Collier on Bankruptcy, supra,* ¶ 7041.01. If the debtor succeeds in obtaining a discharge, a creditor or class of creditors particularly favored by Congress is hurt; hence Bankruptcy Rule 7041 forbids dismissal of a complaint objecting to a debtor's discharge except on notice to the trustee in bankruptcy (as well as to the U.S. Trustee and anyone else that the bankruptcy court directs to be notified). In any event, since the ex-wife's claim in this case was the biggest claim in the bankruptcy proceeding, had the defendant succeeded in knocking it out by his fraud his action would have been fraud in the proceeding itself rather than in an adversary proceeding that had only a tangential effect on the overall bankruptcy case.

We move to the defendant's conviction under 18 U.S.C. § 2252A for possession of child pornography, defined as sexually explicit images of a minor. 18 U.S.C. § 2256(8). The first federal child pornography statute, enacted in 1978 (four years after the defendant took the photographs of his 16-year-old sister-in-law), defined a "minor" to mean anyone under 16. Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95-225, § 2253(1), 92 Stat. 7 (1978). An amendment in 1984 redefined "minor" as anyone under 18. Pub. L. 98-292, § 253(1),

98 Stat. 204 (1984). The defendant was charged with possession of child pornography in 2005 and 2006, long after the statute had been amended to raise the age of majority. But he argues that since the photographs were not illegal when made, the amended statute is inapplicable to him.

He does not argue that Congress can't criminalize the continued possession of pornography that was legal when created. *United States v. Bateman,* 805 F. Supp. 1053, 1055 (D.N.H. 1992); *United States v. Porter,* 709 F. Supp. 770, 774 (E.D. Mich. 1989), *aff'd,* 895 F.2d 1415 (6th Cir. 1990). But he contends that unless his interpretation is adopted, the statute will be incoherent because it creates an "affirmative defense" for cases in which either the "minor" depicted in the pornography possessed by the defendant was actually an adult or the pornography was not produced "using any actual minor." 18 U.S.C. § 2252A(c). (The two clauses are redundant-the second includes the first-but the second is broader because it includes the case in which no person was used in the creation of the pornographic depiction; it might be a painting of an imaginary person or a computer simulation.) One function of the affirmative defense, he argues, is to grandfather the possession of pornography that was legal when it was created. Peel did not raise the issue in the district court, but it is the heart of his challenge to his conviction for child pornography.

At argument the government's lawyer conceded that to prove a violation of the statute the government

has to prove that a real-life minor, not a computer simulation or an adult looking like a minor, was used in the creation of the pornography. The effect of an affirmative defense that entitled the defendant to prove the contrary would thus be that the government would have to prove that a child was used and the defendant would have to prove that a child wasn't used. The statute is confused, but not that confused; and the least plausible interpretation is that it grandfathers a category of what the law now deems to be child pornography.

The affirmative defense came into the statute in 1996, when Congress in the Child Pornography Prevention Act, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996), for the first time outlawed virtual child pornography-pornography involving a computer simulation of a child rather than an actual child: an image "that ... appears to be ... of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(B) (1996). This language could have been thought to reach a case in which an adult who looked like a child was used in the production of pornography rather than an actual child. But that was not Congress's intent; its concern was with computer simulations. Hence the affirmative defense, explained in the Senate committee report as follows:

> [The bill] ... does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor. Accordingly, the bill includes ... an affirmative defense provision

> for material produced using adults. Under that provision, it is an affirmative defense to a charge under section 2252A that the material in question was produced using an actual person or persons engaging in sexually explicit conduct, each of whom was an adult at the time the material was produced, provided the defendant did not intentionally pander the material as being child pornography.

S. Rep. No. 358, 104th Cong., 2d Sess. 21 (Aug. 27, 1996).

Within a few years, however, the defense was overtaken by the Supreme Court's decision holding that the production of non-obscene pornography in which no child was involved cannot constitutionally be prohibited, because there is no sexual abuse in such a case, *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 250-51, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), and only the presence of that abuse, the Court ruled, justifies the suppression of pornography that does not cross the line to obscenity. The government must therefore prove that a child was used unless the pornography is considered obscenity, which only a subset of pornography is, see, e.g., *United States v. Schales,* 546 F.3d 965, 971-72 (9th Cir. 2008); 18 U.S.C. § 1466A, and the statute under which Peel was convicted is not an obscenity statute. *United States v. Irving,* 452 F.3d 110, 120 (2d Cir. 2006); *United States v. Hilton,* 386 F.3d 13, 16 (1st Cir. 2004) (per curiam). (He does not argue that because the photos of his sister-in-law were not

illegal when he took them, they could not constitute sexual abuse of a minor.)

With the government thus required to prove beyond a reasonable doubt that the apparent child in the pornographic image is a real child, the only work left for the provision creating the affirmative defense is to require (in a part of the provision that we did not quote) that the defendant notify the government of his intention to challenge the government's proof that a child was used.

The history makes clear that the affirmative defense was not added to the statute in order to grandfather pornography created before the definition of a child was changed from younger than 16 to younger than 18. It was added to exculpate child pornography made with adult rather than child models, at a time when the Supreme Court had not yet ruled that the making of such pornography could not constitutionally be punished, and therefore at a time when Congress thought it could place the burden of proof concerning the age of the model used in producing the pornography on the defendant rather than on the government. There isn't the slightest indication of a congressional purpose to grandfather a category of child pornography, so that anyone who happened to have pornographic photographs of 16- and 17-year-olds taken before 1984 would be free to market them. Such a person would have a market that was shielded from new competition and thus offered him substantial profit opportunities because after 1984 there could be no further legal production

of such pornography in which an actual child had been used. The possessor would enjoy the same kind of quasi-monopoly as someone who possesses paintings by an artist when he dies prematurely, freezing the quantity of his output and thus pushing up the price.

Possession of a photograph of an underage girl or boy must be knowing, however, and the defendant, besides invoking the affirmative defense, argues that the government failed to prove that he knew in 2005 and 2006 that his sister-in-law had been under 18 when he took the photographs. Actually the evidence of his knowledge was extensive. He had known her since she was in fourth grade, had spent a great deal of time with her at the time of his marriage to her sister, when she was in high school, and years later had represented her (the defendant is a lawyer) in her divorce proceeding.

We turn to the sentencing issues. In calculating intended loss for purposes of determining the guideline range for the defendant's offenses of bankruptcy fraud and obstruction of justice, the judge began with the amount that the defendant owed his ex-wife under the terms of the marital settlement-$230,000-and the amount that the settlement required him to pay her in the future-$2500 per month for the rest of Peel's life. His life expectancy was 17.5 years, so the estimated total payout over that time would be $525,000. So far, so good, for Peel hoped by his blackmail to get her to drop both claims. But Peel argues that the estimated

$525,000 in future monthly payments that he owed his ex-wife should be discounted to present value, since a smaller sum received today and conservatively invested would yield $525,000 over a period of 17.5 years. In civil cases in which the loss for which damages are sought will be incurred in the future (as where the plaintiff in an accident case is disabled from earning future income), courts reduce the future loss to a sum that the plaintiff could invest safely at an interest rate at which the sum would grow to an amount that would compensate him fully for his future loss. See, e.g., *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark,* 39 F.3d 812, 819 (7th Cir. 1994).

Courts do this because civil damages (excluding punitive damages) seek to put the plaintiff in the financial position that he would have occupied had he not been wronged by the defendant. *Illinois School Dist. Agency v. Pacific Ins. Co.,* 571 F.3d 611, 617 (7th Cir. 2009). Because the aim of criminal sanctions is to punish, we find provisions in the sentencing guidelines that would strike a discordant note in a civil case-such as the direction to sentencing judges to include even those losses that "would have been impossible or unlikely to occur," U.S.S.G. § 2B1.1, Advisory Note 3(A)(ii), and the further direction that "loss shall not include the following: Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs," U.S.S.G. § 2B1.1, Advisory Note 3(D)(i), so that the offense level for a financial crime is not increased if

the prosecution is delayed, even though the delay increases the cost of the crime.

The question whether to discount future losses (actual or intended) to present value seems to have arisen rarely in criminal cases. A few cases, however, have discounted a future intended loss to present value, such as *United States v. Broderson,* 67 F.3d 452, 457 (2d Cir. 1995), where just as in a civil case the court required discounting to present value an expected stream of monthly payments of which the defendant had defrauded the government. See also *United States v. Edgar,* 971 F.2d 89, 93-94 and n.5 (8th Cir. 1992); *United States v. Brown,* 338 F. Supp.2d 552, 559 (M.D. Pa. 2004). We have found no cases that refused to discount a future loss to present value if asked to do so. Almost everyone would rather lose $2 in 20 years than $1 today, and this implies that the loss inflicted by appropriating a $2 benefit that the victim would have to wait 20 years to receive is less than taking $1 from him now.

So if a defendant presents credible evidence for discounting a stream of future payments to present value, the district court must consider it. And in this case the defense presented expert evidence that the present value of the stream of future monthly payments that Peel owed his ex-wife was $314,000. This amount, if adopted as the measure of intended future loss and added to the intended present loss of $270,000, would, after subtraction of the $158,000 in cash that the ex-wife would have received under the agreement that Peel tried to force on her, have

produced an offense level two levels below the one applied by the district court. The court, however, rejected the effort to prove present value on the ground that U.S.S.G. § 2B1.1, Application Note 3(E), entitled "Credits Against Loss," does not include, among the credits listed, discounting to present value; credits are such things as "the fair market value of the property returned" to the victim by the criminal before the offense was detected. But credits presuppose that the loss or intended loss has been determined and afterward part of it was restored, as in a case where an embezzler gambles successfully with the embezzled funds and so is able to (and does) return those funds. The amount of the embezzlement is the loss, *United States v. Lauer,* 148 F.3d 766, 767-68 (7th Cir. 1998); *United States v. Mount,* 966 F.2d 262, 266-67 (7th Cir. 1992), but the harm caused by the loss is lessened by the criminal's voluntary act. That has nothing to do with calculating the loss; the calculation precedes consideration of any credits to which the defendant is entitled; and so the application note has no relevance to whether loss is measured by its discounted or an undiscounted value.

We are reluctant to make federal sentencing more complicated than it is, but requiring a calculation of the present value of a future loss, if the defendant presents credible evidence, need not burden the judge, let alone put him in a straitjacket. "The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that

evidence. For this reason, the court's loss determination is entitled to appropriate deference." U.S.S.G. § 2B1.1, Application Note 3(C). Since the guidelines are no longer binding, *Gall v. United States,* 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the judge need not give controlling weight to the present-value calculation.

Of particular relevance to the present case, the nature and circumstances of the defendant's crime may make discounting to present value of only limited utility in assessing loss. Peel's attempted blackmail of his ex-wife is a case in point. A blackmailer is apt not to stick to his deal with his victim but instead to come back for more later, as in *Commonwealth v. Beauchamp,* 49 Mass. App. Ct. 591, 732 N.E.2d 311, 316-17 (2000), and *United States v. Veltmann,* 6 F.3d 1483, 1488-89 (11th Cir. 1993), so that the initially intended loss is apt to understate the loss to the victim had the blackmail succeeded. True, if Peel were to give all the photos back to his ex-wife, as he promised to do, he could not have blackmailed her further. But there would have been no assurance that he would do that, since she didn't know how many of the photos he had. And even if the blackmailer doesn't return for more, the victim is apt to be in constant fear of such a return, adding to the cost of the crime. Ronald H. Coase, "The 1987 McCorkle Lecture: Blackmail," 74 *Va. L. Rev.* 655, 674-75 (1988).

This case has to be remanded for other reasons, and we leave to the discretion of the district judge whether to discount the monetary loss inflicted by a blackmail attempt (in this case an intended such loss) to its present value and how best to weigh that determination in deciding on an appropriate sentence.

Besides not discounting the future loss intended by Peel, the judge added a further intended loss-the $611,000 in other claims that had been filed in the bankruptcy proceeding. By bringing the total intended loss above $1 million (it would have fallen just short of that amount had he done the present-value calculation of the ex-wife's future loss suggested above), the addition further increased Peel's guidelines sentencing range. That addition was error. None of the other creditors (or anyone else) would have been hurt had the blackmail attempt succeeded; nor was it any part of the defendant's intention to hurt them. Intended losses are intended losses, not bookkeeping entries. See *United States v. Arthur,* 582 F.3d 713, 720-21 (7th Cir. 2009); *United States v. Bussell,* 504 F.3d 956, 960-63 (9th Cir. 2007); *United States v. Holthaus,* 486 F.3d 451, 455 (8th Cir. 2007); *United States v. Wheeldon,* 313 F.3d 1070, 1073 (8th Cir. 2002). The creditors would actually have been better off had the blackmail attempt succeeded because there would then have been one less creditor with whom to divide the defendant's meager assets. The bankruptcy court would not have been hurt merely because one creditor had dropped out. In fact it would have saved

time by not having to adjudicate that creditor's claim.

The remaining sentencing issue is whether the judge was right to apply section 2G2.2(b)(3)(A) of the sentencing guidelines, which increases the guidelines sentencing range for child pornography if the pornography was "distribut[ed] for pecuniary gain." The pecuniary gain, the judge determined, was the amount of money that the defendant had hoped to gain from his blackmail attempt. The defendant was offering to sell the pornographic photographs to his ex-wife for forgiveness of part of his debt to her under their marital settlement agreement.

The primary aim of the pecuniary-gain enhancement is to discourage trafficking in pornography, which increases the incentive to create pornography and thus the amount and so the number of abused children, the "models" for the photographs. *New York v. Ferber,* 458 U.S. 747, 761-62 and n.13, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); see also *United States v. Goldberg,* 491 F.3d 668, 672 (7th Cir. 2007); *United States v. Richardson,* 238 F.3d 837, 839 (7th Cir. 2001). But the use of pornography for blackmail is not obviously less bad conduct than the sale of pornography in the market. The defendant used pornography to avoid a debt and thus for pecuniary gain, and we think that brings him within the scope of the guidelines provision.

It's true that in ordinary language "distribution" suggests sale to more than one person. But in the

guidelines it means "*any act,* including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor," U.S.S.G. § 2G2.2, Application Note 1 (emphasis added). That must include a single sale. Moreover, the defendant was offering to sell to his ex-wife a number of photos, and it is hard to see why selling one pornographic photo to each of (say) five people deserves a heavier punishment than selling five photos to one person, especially given the underlying concern with the harm to the child model used in the photographs.

To conclude, the judgment is affirmed in part and reversed in part, and the case remanded with directions that the judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. § 3553(a).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

Appendix B

United States District Court,
S.D. Illinois.

UNITED STATES of America, Plaintiff,
v.
Gary E. PEEL, Defendant.
No. 06-CR-30049-WDS.

July 23, 2007.

MEMORANDUM & ORDER

STIEHL, District Judge.

This matter is before the Court on defendant's motion for a new trial (Doc. 152), to which the government has filed a response (Doc. 153). The defendant asserts that there were several errors committed during the trial which denied him a fair trial, e.g. that the court gave improper jury instructions; excluded evidence that prevented the defendant from presenting a complete defense; that the evidence was insufficient to support the defendant's conviction, and that based on these errors, he is entitled to a new trial.

MOTION FOR NEW TRIAL

The Seventh Circuit has held that a motion for new trial should be granted "only if the evidence 'preponderate[s] heavily against the verdict, such

that it would be a miscarriage of justice to let the verdict stand.' " *United States v. Swan,* 486 F.3d 260, 266 (7th Cir. 2007) *(quoting United States v. Reed,* 875 F.2d 107, 113 (7th Cir. 1989) (other citations omitted)). "We view the evidence in the light most favorable to the government, recognizing that it is the exclusive function of the jury to determine the credibility of witnesses and draw reasonable inferences." *United States v. Theodospoulos,* 48 F.3d 1438, 1444 (7th Cir. 1995) *quoted in Swan,* 486 F.3d at 266.

BACKGROUND

The defendant was convicted of all charges in the indictment. Count 1 of the Indictment charged the defendant with bankruptcy fraud, alleging that between January 20 and January 31, 2006, the defendant knowingly and fraudulently gave, offered, received and attempted to obtain money and property, remuneration, compensation, reward, advantage and promise thereof for acting and forbearing to act in a case under Chapter 11 of the Bankruptcy Code, all in violation of 18 U.S.C. § 152(6). Count 2 charged the defendant with obstruction of justice alleging that between January 20 and 31, 2006, the defendant did knowingly and corruptly attempt to obstruct, influence, and impede an official proceeding, all in violation of 18 U.S.C. § 1512(c)(2).

Counts 3 and 4 charged the defendant with possession of child pornography. Specifically, Count

3 charged that on or about January 20, 2006, the defendant knowingly possessed material that contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce that was placed in the mailbox of the defendant's ex-wife, all in violation of 18 U.S.C. § 2252A(a)(5)(B).

Count 4 charged that on or about January 31, 2006, the defendant knowingly possessed material that contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce, namely a color photograph containing images of a child, that was located on the person of Gary E. Peel, all in violation of 18 U.S.C. § 2252A(a)(5)(B).

ANALYSIS

1. The Jury Instructions

a. Possession of Child Pornography Counts

The defendant asserts that the Court improperly refused to give an instruction on the question of lasciviousness, i.e. the defendant's subjective intent in taking the photographs in question. The defendant sought to have the jury instructed that his intention when he took the photograph was irrelevant to the determination of whether the image met the definition of child pornography. The photographs in

question involved the depiction of a young girl, who the evidence at trial revealed was sixteen years old, naked on the floor of an office (the defendant's then law office) with her legs spread, and the focus of the photo being her pubic area.

"Child pornography" is defined in 18 U.S.C. § 2256(8) as "any visual depiction, including any photograph ... of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct...." The Court instructed the jury on the definition of "sexually explicit conduct"[1], on the definition of "lascivious"[2] and on the six-factors used to determine whether an image is lascivious as set forth in *United States v. Dost,* 636 F. Supp. 828, 932 (S.D. Cal. 1986) *aff'd sub nom. United States v. Wiegland,* 812 F.2d 1239 (9th Cir. 1987); *see also, United States v. Moore,* 215 F.3d 681, 686 (7th Cir. 2000)[3].

---

[1] Which was defined as "the actual or simulated lascivious exhibition of the genitals or pubic area of any person." (Government's Instruction # 26).

[2] Which was defined as "that which tends to arouse sexual desires. (Government's Instruction # 4).

[3] The six-factor test used to determine whether an image is lascivious is "(1) whether the focal point is on the child's genitalia or pubic area; (2) whether the setting is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual

The defendant asserts that the Court's failure to give an instruction on his subjective intent expanded the scope of the statute beyond its plain language in violation of his Fifth Amendment rights. He also asserts that failure to give the subjective intent instruction allowed the jury to consider the testimony of Donna Rogers relating to how the photos were produced, including the fact that the defendant posed Rogers for the photographs. The defendant asserts that because the jury had heard evidence that the defendant and Rogers had a sexual relationship at the time the photographs were taken, this allowed the jury to weigh his subjective intentions anyway when determining whether the photographs met the criteria for child pornography.

In this case, the jury had the images to review and were able to determine, based on the instructions given, whether the intended effect of the images met the definition instructions and the six-factor *Dost* test for lasciviousness. The Court remains persuaded that the personal fantasies or personal reaction to the photographs is not relevant to the jury's determination of whether the images were designed to elicit a sexual response from the viewer. The Government did not question the defendant on whether he personally was aroused from the images, nor did it argue that to the jury. In this case, the photos, on their face "appear[ed] to be of a sexual character." *United States v. Kimmerling,* 285 F.3d

---

response in the viewer." *See, Moore,* 215 F.3d at 686. (Government's Instruction # 27).

644, 646 (8th Cir. 2002). The Ninth Circuit in *Wiegland* (affirming the conviction in *Dost)* held that lascivious is "no different in its meaning than 'lewd' a commonsensical term whose constitutionality was specifically upheld" by the Supreme Court. 812 F.2d at 1243-44. Although the Ninth Circuit noted that "private fantasies are not within the statute's ambit" *id.* at 1245, it, nonetheless, stated:

> The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by § 2255(2)(E) is a picture of a child's sexual organs displayed lasciviously-that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.

Id. at 1244. Upon review of the record, the Court remains persuaded that the jury was properly instructed on the issues raised by the charges in Counts 3 and 4 and, therefore, DENIES defendant's motion for a new trial on this ground.

b. Silence in the Face of Accusation

The defendant asserts that the Court erred when it gave the jury an instruction relating to the defendant's silence in the face of accusation by the defendant's former wife during a telephone call.[4] In

---

[4] "You have heard evidence that Deborah J. Peel accused [the] defendant of 'blackmail,' and that the defendant did not deny or object to the accusation. If you find that the defendant was present and heard and understood the accusation, and that it

that conversation, Deborah J. Peel accused the defendant of "blackmail" and he did not respond to the charge. The defendant was not under arrest at that time, and the defendant testified at trial as to the conversation and acknowledged that he did not respond to her assertion of blackmail.

Pursuant to Fed. R. Evid. 801(d)(2)(B) evidence of silence in the face of an accusation is admissible when the defendant is an active participant and a person confronted with such an accusation would normally deny it. "[S]ilence qualifies as an admission because [the] accusation is the type of statement that a party normally would respond to if innocent." *United States v. Ward,* 377 F.3d 671, 676 (7th Cir. 2004). The *Ward* court referenced the Advisory Note to this rule which states, "When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue." *Id.* The jury not only heard the recorded conversation, but also heard the defendant's explanation of that conversation during his testimony at trial. There is no question that the defendant was present when the accusation was made, that he heard it and understood it.

The defendant asserts that the insertion of the term "blackmail" for the language in the pattern instruction "crime" suggested to the jury that his

---

was made under such circumstances that the defendant would deny it if it were true, then you may consider whether the defendant's silence was an admission of the truth of the accusation." (Government's Instruction # 9).

failure to deny the accusation was a confession as a matter of law. The Court **FINDS** that under the circumstances of this case it was proper to give the pattern instruction to the jury on the fact that it could consider "whether the defendant's silence was an admission of the truth of the accusation." 7th Circuit Pattern Jury Instruction 3.03. The jury was not instructed that the silence was an admission as a matter of law, but rather that the jury could consider that fact in its deliberation, and decide if it amounted to an admission. Accordingly, the Court **DENIES** defendant's motion for new trial on this ground.

2. Evidence Related to Deborah J. Peel

The defendant renews his argument made before and during trial that he should have been able to present evidence relating to Deborah J. Peel's alleged misappropriation of funds, her use of joint account funds for a face lift, her bias, untruthfulness, and state of mind, as this evidence was relevant to her credibility as a witness. The Court issued a ruling on these issues as part of its pretrial determination of the government's motion in limine (Doc. 113). The Court found that this evidence was not relevant to the charges in this case, and did not amount to a defense to those charges, and therefore was not relevant and would not be admitted.

The defendant asserts that the improper use of funds, and her explanation about her spending choices was relevant to her credibility, no matter

how proper her access to the funds may have been. The defendant asserts that she misappropriated funds from several joint accounts that were part of the Marital Settlement Agreement. However, the Court found that the record revealed that Deborah J. Peel had access to those accounts, and therefore, the defendant could not establish that she did anything wrong with the funds in those accounts because they were hers to use.

The Court further found that even if the defendant could have established that she did inappropriately use the funds, that fact would not be a defense to the charges in this case. This is a strawman argument which is of little help to the defendant's case. It is rather like saying, "I had no money to feed my children, so I robbed the bank." The fact that there was no money and there were hungry children, is not a defense to the charge of bank robbery. Similarly, the defendant's claim pretrial and during trial that Deborah J. Peel's alleged use of funds led him to be in financial difficulty, and then to commit bankruptcy fraud and obstruction of justice by threatening her with the exposure of the photographs of her sister (the child pornography) is not a defense to either the charge of bankruptcy fraud or obstruction of justice. Exclusion of this evidence simply did not deprive the defendant of a "complete defense."

Similarly, the Court is not persuaded that the state of mind of Deborah J. Peel was relevant. The government did not seek to introduce any out-of-

court statements, and the defendant was able to cross-examine Deborah J. Peel at length about her displeasure with the defendant's attempts to set aside the marital settlement agreement. It was evident that she was not pleased with that settlement, and the jury could easily judge both her credibility and her bias against the defendant, and thereby determine her possible motive for the nature of her testimony. The Court, therefore, properly rejected the defendant's attempt to introduce evidence of her state of mind.

The Court remains persuaded that its ruling (Doc. 113) was proper given the charges in this case, and the defendant has forwarded nothing new which would cause the Court to revisit that ruling. Accordingly, defendant's motion for a new trial on the basis that the Court improperly excluded evidence related to Deborah J. Peel is **DENIED** on all grounds raised.

3. *Defendant's Expert*

The Court set limits on the possible testimony of defendant's proposed expert, Thomas L. Hoops, as part of its pretrial rulings. The defense did not attempt to call Mr. Hoops after the testimony of the defendant. The defendant has raised no new grounds in this part of his motion. The defendant seeks a new trial in which the Court would allow Hoops to testify as to the defendant's financial position relative to his ex-wife during their negotiations on the marital settlement, asserting that his financial position is

relevant to his intent at the time of the incidents that underlie the charges in this case. However, this is the same evidence which the Court previously discussed as non-relevant to the charges. The government did not challenge the propriety of the defendant's filing of his bankruptcy petition, therefore, his financial condition at the time it was filed, his intent in filing the bankruptcy, or how generous his offers were to his ex-wife with respect to the marital settlement remain irrelevant to the charged offenses. The record contains the Court's prior rulings with respect to the possible testimony of Hoops, and the Court, for the same reasons, **DENIES** defendant's motion for a new trial on this ground.

4. Testimony of Marianne Dilman

The defendant renews his objections raised at trial to the testimony of Marianne Dilman who was called by the government to establish the location of Polaroid manufacturing facilities in order to establish that the film used to take the photographs of Rogers was not manufactured in Illinois. The government called Dilman as a fact witness, not as an expert, however, the defendant objected, asserting that she was an expert witness. During the trial the Court ruled that she was an historical facts witness, and not an expert, and allowed her to testify using records provided to her by her employer. Ms. Dilman testified as to the business practices of Polaroid, based upon the records kept by the business. "Businesses have incentives to keep accurate records germane to their business, and so the material

contained in those records is more likely to be truthful than the average hearsay." *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000). Further, "But[,] that is provided that this material-the statements sought to be used in evidence for their truth value-was created or adopted by the business record keeper." *Id.* Here the records about which Ms. Dilman testified, those records establishing that Polaroid did not have plants in Illinois that processed the film used to take the photographs in question, was proper testimony under the business records exception of Rule 803. Accordingly, the Court **DENIES** defendant's motion for new trial on this ground.

5. Whether the Government Proved that the Child Pornography was made with Materials that Traveled in Interstate Commerce.

The defendant asserts that there was no evidence that the paper and ink, the component materials of the photographic paper, used to make the copies of the photographs of Rogers were made outside Illinois. The defendant's argument is, essentially, that the original photos were copied by the defendant, and that there is no proof that the photocopy component materials were manufactured outside of Illinois. The statute provides that the child pornography was "produced using materials" that had traveled in interstate commerce.

Count 3, as discussed above, charged that the defendant knowingly possessed material that

contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce that was placed in the mailbox of the defendant's ex-wife, all in violation of 18 U.S.C. § 2252A(a)(5)(B). Count 4 charged that the defendant knowingly possessed material that contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce, namely a color photograph containing images of a child, that was located on the person of Gary E. Peel, all in violation of 18 U.S.C. § 2252A(a)(5)(B). The evidence was that the photocopier traveled in interstate commerce. That photocopier was used to make the copies, therefore, satisfying the statutory requirements for interstate travel. Similarly, as discussed above, the Polaroid paper on which the original photographs were taken traveled in interstate commerce, thereby satisfying the statutory requirements for those charges.

Accordingly, defendant's motion for a new trial on the grounds that the government failed to prove interstate travel is **DENIED** on all grounds raised.

6. The Scienter Requirement of 18 U.S.C. § 2252A

Finally, the defendant asserts that the government failed to establish that the girl depicted in the photographs was a child. The defendant argues that the girl in the photographs appears to be sexually mature, and at the time of the taking of the

photographs, the sexual relationship between Peel and Rogers was legal under Illinois law. The defendant asserts that with respect to the photographs and Donna Roger's age, although he may have known her age at the time he took the photographs, he did not remember her age at the time of the photographs when he possessed them in 2006, the time of the charged offenses of possession of child pornography.

Here, the evidence was that the defendant knew the subject of the photographs as his wife's younger sister. There was a plethora of evidence as to her age at the time the photographs were taken. The defendant's testimony that he thought she was eighteen was presented to the jury, but the jury apparently did not find him to be credible on this point. The Court finds no basis for granting a new trial on this ground and the defendant's motion is **DENIED**.

CONCLUSION

Accordingly, the Court **DENIES** defendant's motion for a new trial on all grounds raised.

IS SO ORDERED.

Appendix C

FILED
MAR 2 3 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) CRIMINAL NO. 06 CR 30049 WDS
)
GARY E. PEEL,)
)
Defendant.)

VERDICT

We, the jury, find the defendant, GARY E. PEEL, Guilty
(Guilty/Not Guilty)

of Count 3 of the Indictment - Possession of Child Pornography, as charged in the Indictment.

William L. Teal
FOREPERSON

BEST AVAILABLE COPY

FILED
MAR 23 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) CRIMINAL NO. 06 CR 30049 WDS
)
GARY E. PEEL,)
)
Defendant.)

VERDICT

We, the jury, find the defendant, GARY E. PEEL, Guilty (Guilty/Not Guilty)

of Count 4 of the Indictment : Possession of Child Pornography, as charged in the Indictment.

William L Teal
FOREPERSON

Appendix D

FILED
NOV 19 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

UNITED STATES DISTRICT COURT
Southern District of Illinois

UNITED STATES OF AMERICA
V.

GARY E. PEEL

JUDGMENT IN A CRIMINAL CASE

Case Number: 06-CR-30049-01-WDS

USM Number 07215-025

Phillip J. Kavanaugh, III
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3 and 4 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §152(6)	Bankruptcy Fraud	01/31/2006	Count 1
18 U.S.C. §1512(c)(2)	Obstruction of Justice	01/31/2006	Count 2
18 U.S.C.§2252(a)(5)(B)	Possession of child pornography	01/20/2006	Count 3
		01/31/2006	Count 4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 19, 2007
Date of Imposition of Judgment

William D. Stiehl
Signature of Judge

HONORABLE WILLIAM D. STIEHL, U.S. DISTRICT JUDGE
Name and Title of Judge

19 November 2007
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: GARY B. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

144 MONTHS. THIS SENTENCE CONSISTS OF A TERM OF 60 MONTHS ON COUNT 1, 144 MONTHS ON COUNT 2, AND 120 MONTHS ON EACH OF COUNTS 3 AND 4, ALL SUCH TERMS TO BE SERVED CONCURRENTLY.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GARY E. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 YEARS ON EACH OF COUNTS 1, 2, 3 AND 4, ALL SUCH TERMS TO RUN CONCURRENTLY.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days after being released on supervision and at least two periodic drug tests thereafter, not to exceed 52 tests in a one year period.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☒ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: GARY E. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide the probation offices and the Financial Litigation Unit of the United States Attorney's Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

Since the defendant has been convicted of a sexual offense, he shall comply with all sexual offender registration requirements.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: GARY E. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$ 1,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____0	$ _____0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GARY P. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ ; or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments are due immediately through the Clerk of the Court. If the defendant is unable to pay immediately, then payments shall be required while the defendant is incarcerated in the U. S. Bureau of Prisons, in compliance with the Inmate Financial Responsibility Program. While incarcerated, the defendant shall make monthly payments consisting of one-half of the amount of monthly deposits into the defendant's inmate trust account; however, if the account balance is less than $20.00, no payment shall be required. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $25 per month, or 10 % of defendant's monthly gross earnings, whichever is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s).

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Appendix E

United States Court of Appeals,
for the Seventh Circuit.
Chicago, Illinois 60604

March 15, 2010

Before

RICHARD A. POSNER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
DAVID F. HAMILTON, *Circuit judge*

No. 07-3933

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Illinois
v.	No. 06-cv-30049-WDS
Gary E. PEEL, *Defendant-Appellant.*	William D. Stiehl, *Judge*

On February 26, 2010, defendant - appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc.* The petition is therefore DENIED.

---

* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

14

No. 10-83

In the Supreme Court of the United States

GARY E PEEL, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A BREUER
Assistant Attorney General

JOHN M PELLETTIERI
Attorney

Department of Justice
Washington, D C 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2252A(a)(5)(B) violates the First Amendment as applied to petitioner because the statute makes it unlawful to possess (in 2006) sexually explicit photographs of a 16-year-old girl that were produced before Congress outlawed child pornography and at a time when the age of consent in the State where the photographs were produced was 16.

2. Whether petitioner's convictions for possessing (in 2006) sexually explicit photographs of a 16-year-old girl violate the Ex Post Facto Clause of the Constitution because the photographs were produced before Congress outlawed child pornography and at a time when the age of consent in the State where the photographs were produced was 16.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002) 7, 11, 13, 14
California Dep't of Corr. v. *Morales*, 514 U.S. 499 (1995) 15
Collins v. *Youngblood*, 497 U.S. 37 (1990) 15
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 11
Easley v. *Reuss*, 532 F.3d 592 (7th Cir. 2008) 11
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 9
Johnson v. *United States*, 529 U.S. 694 (2000) 15
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 10
Miller v. *Florida*, 482 U.S. 423 (1987) 15
New York v. *Ferber*, 458 U.S. 747 (1982) 13, 14, 15
People v. *Beksel*, 261 N.E.2d 40 (Ill. App. Ct. 1970) 14
People v. *Keegan*, 286 N.E.2d 345 (Ill. 1971), cert. denied, 406 U.S 964 (1972) 14
Puckett v. *United States*, 129 S. Ct. 1429 (2009) 12
United States v. *Bateman*, 805 F. Supp. 1053 (D.N.H. 1992) 16

Cases—Continued: Page

United States v. *Feliciano*, 223 F.3d 102 (2d Cir. 2000), cert. denied, 532 U.S. 943 (2001) 12

United States v. *Juvenile Male*:

590 F.3d 924 (9th Cir. 2010), petition for cert. pending, No. 09-940 (filed Feb. 9, 2010) 16

130 S. Ct. 2518 (2010) 17

United States v. *Marcus*, 130 S. Ct. 2159 (2010) 12

United States v. *Olano*, 507 U.S. 725 (1993) 12

United States v. *Paton*, 110 F.3d 562 (8th Cir. 1997) 16

United States v. *Petitjean*, 883 F.2d 1341 (7th Cir. 1989) 12

United States v. *Porter*, 709 F. Supp. 770 (E.D. Mich. 1989), aff'd, 895 F.2d 1415 (6th Cir.), cert. denied, 498 U.S. 1013 (1990) 16

United States v. *Trupin*, 117 F.3d 678 (2d Cir. 1997), cert. denied, 522 U.S. 1051 (1998) 16

United States v. *Waters*, 23 F.3d 29 (2d Cir.), cert. denied, 513 U.S. 867 (1994) 16

United States v. *Williams*, 504 U.S. 36 (1992) 10

United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 15

VMI v. *United States*, 508 U.S. 946 (1993) 9

Wills v. *Texas*, 511 U.S. 1097 (1994) 11

Constitution, statutes and rules:

U.S. Const.:

Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 15, 16

Amend. I 9, 10, 11, 12, 13, 15

Amend. V (Double Jeopardy Clause) 8

Statutes and rules—Continued: Page

Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 101(a), 110 Stat. 3009 ... 13
Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a), 98 Stat. 205 ... 4
Crime Control Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 7814 ... 4
Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.* ... 16
Protection of Children Against Sexual Exploitation Act of 1978, Pub. L. No. 95 225, § 2253(1), 92 Stat. 8 ... 4
Sex Offender Registration and Notification Act, Pub. L. No. 109-248, Tit. I, 120 Stat. 590 ... 16
18 U.S.C. 152(6) ... 2, 3
18 U.S.C. 1512(c)(2) ... 2, 3
18 U.S.C. 2252A(a)(5)(B) ... 2, 3, 5, 12, 15, 17
18 U.S.C. 2252A(c) ... 4, 5, 6, 7, 10
18 U.S.C. 2256(1) ... 4
18 U.S.C. 2256(8)(A) ... 3
18 U.S.C. 3553(a) ... 8, 9
Fed. R. Crim. P.:
Rule 12(b)(3)(A) ... 12
Rule 12(b)(3)(B) ... 12
Rule 12(e) ... 12
Rule 52(b) ... 12

In the Supreme Court of the United States

No. 10-83

GARY E. PEEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 595 F.3d 763. The relevant opinion of the district court (Pet. App. 23a-36a) is unreported but is available at 2007 WL 2126257.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2010. A petition for rehearing was denied on March 15, 2010 (Pet. App. 45a). On June 2, 2010, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 12, 2010, and the petition was filed on July 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of one count of bankruptcy fraud, in violation of 18 U.S.C. 152(6); one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(2); and two counts of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). The district court sentenced petitioner to 144 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed in part and reversed in part, remanding to the district court with instructions to vacate either the bankruptcy fraud or the obstruction of justice conviction, and resentence petitioner after redetermining the advisory Sentencing Guidelines range. Pet. App. 1a-22a, 39a-41a.

1. In 1974, petitioner had an affair with his then-wife's 16-year-old sister. During the affair, which lasted several months, petitioner took several nude, sexually explicit photographs of his sister-in-law. The photographs depicted the 16-year-old girl sitting naked on the floor of petitioner's law office with her legs spread and with the focus on the girl's pubic area. When his sister-in-law requested the pictures, petitioner gave her some, which she destroyed, but retained others without her knowledge. Pet. App. 1a-2a, 25a-26a.

In 2003, petitioner and his wife divorced and agreed to a marital settlement. The following year, petitioner filed suit in Illinois state court seeking to vacate the settlement. Petitioner subsequently filed for bankruptcy and asked the bankruptcy court to discharge his financial obligations to his ex-wife under the terms of the marital settlement. Petitioner's ex-wife opposed the discharge and filed a claim for the money petitioner

owed her under the terms of the original settlement. Pet. App. 2a.

During the course of settlement negotiations, petitioner told his ex-wife that he had nude photographs of her younger sister and that he would make those pictures public, and send them to her elderly parents, if the ex-wife did not agree to a favorable settlement. Petitioner then placed photocopies of the pictures in his ex-wife's mailbox. The ex-wife informed law enforcement authorities about the threat and, at their direction, recorded subsequent conversations with petitioner. The recorded conversations confirmed that petitioner was blackmailing his ex-wife with the sexually explicit photographs. Pet. App. 2a-3a; 10/29/2009 Gov't C.A. Br. 4.

2. On March 22, 2006, a grand jury in the Southern District of Illinois returned an indictment charging petitioner with one count of bankruptcy fraud, in violation of 18 U.S.C. 152(6); one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(2); and two counts of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Indictment 3-5. As relevant here, the indictment charged petitioner with the possession of child pornography in January 2006. *Id.* at 4-5.

At that time, 18 U.S.C. 2252A(a)(5)(B) made it unlawful to knowingly possess material "that contains an image of child pornography * * * that was produced using materials that have been mailed, or shipped, or transported in interstate and foreign commerce by any means." Child pornography was defined to include a visual depiction of "sexually explicit conduct, where" "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(A). The term "minor" was defined as

"any person under the age of eighteen years." 18 U.S.C. 2256(1).[1]

Section 2252A(c) of Title 18 provided an affirmative defense to a charge of possessing child pornography if:

> (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and (B) each such person was an adult at the time the material was produced; or
>
> (2) the alleged child pornography was not produced using any actual minor or minors.

To assert this defense, the defendant must provide timely notice before trial. 18 U.S.C. 2252A(c). If the defendant fails to comply with the statute's notice requirements, the district court "shall, absent a finding of extraordinary circumstances that prevented timely compliance," prohibit the defense. *Ibid.*

Petitioner did not give the district court or the government notice of any intent to raise an affirmative defense under 18 U.S.C. 2252A(c), nor did he in fact raise such a defense at trial or in his post-trial motions. 09/11/2009 Pet. C.A. Br. 34. At trial, petitioner argued, *inter alia*, that he could not be found guilty of the child pornography offenses because, at the time of possession, he believed that the photographs depicted his ex-wife's sister over the age of 18. 10/29/2009 Gov't C.A. Br. 32.

---

[1] Congress passed the first federal child pornography statute in 1978 and, at that time, defined a "minor" as anyone under the age of 16. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2253(1), 92 Stat. 8. An amendment in 1984 redefined "minor" as anyone under the age of 18. Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a), 98 Stat. 205. And, in 1990, Congress for the first time made it unlawful to possess images of child pornography. Crime Control Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4814.

The jury disagreed and convicted petitioner on all counts. Pet. App. 1a, 39a.

3. a. After initial briefing by petitioner's counsel, the court of appeals issued an order striking the brief and allowing petitioner to proceed pro se. 8/18/2008 Order. Petitioner then filed a pro se brief arguing, for the first time, that the affirmative defense set forth in 18 U.S.C. 2252A(c) rendered the evidence insufficient to sustain his convictions because, at the time he produced the photographs at issue, his ex-wife's sister was not a minor under then-applicable state or federal law. 12/01/2008 Pet. Pro Se C.A. Br. 19-21.

The court of appeals subsequently issued an order striking all previously filed briefs, appointing new counsel for petitioner, and ordering briefing of all "issues counsel deem[s] appropriate" as well as:

> With respect to [petitioner's] convictions for possessing child pornography in violation of 18 U.S.C. [] 2252A(a)(5)(B)—
>
> a) Whether the government's evidence was sufficient to support [petitioner's] convictions where the images in question were sexually explicit photographs of a sixteen-year-old female taken prior to the enactment of a federal criminal statute regulating child pornography, as defined to cover any person under the age of eighteen years?
>
> b) Whether [petitioner] complied with the procedural requirements for asserting the affirmative defense available under 18 U.S.C. [] 2252A(c), and if not, what is the effect of such noncompliance?

03/24/2009; 04/13/2009 Orders.

With respect to petitioner's child pornography convictions, petitioner's newly appointed counsel made two arguments. 09/11/2009 Pet. C.A. Br. 28-38. First, petitioner argued that the evidence was insufficient to establish that he knowingly possessed child pornography. *Id.* at 28-33. According to petitioner, while the evidence may have shown that he knew the age of his ex-wife's sister at the time the photographs were taken in 1974, the evidence was insufficient to show that he knew the photographs depicted a 16-year-old girl at the time of his unlawful possession in 2006. *Id.* at 32-33. Second, petitioner argued that the district court should have granted a judgment of acquittal because he could have successfully asserted the affirmative defense available under 18 U.S.C. 2252A(c), since his ex-wife's sister was "an adult at the time the material was produced." 09/11/2009 Pet. C.A. Br. 33-38. Because there was no federal child pornography law at the time the pictures were produced, and because the age of consent in the State of production (Illinois) was 16 at that time, petitioner argued that his ex-wife's sister was an "adult" when the photographs were produced. *Id.* at 37-38. In other words, petitioner argued, 18 U.S.C. 2252A(c) is a "grandfather clause" "which makes legal alleged child pornography that depicts an individual who was an adult at the time the material was produced." 11/20/2009 Pet. C.A. Reply Br. 19 (citation omitted).

Petitioner acknowledged that he "neither provided the district court with formal notice that he intended to invoke 18 U.S.C. [] 2252A(c)'s affirmative defense nor explicitly raised that defense at trial." 09/11/2009 Pet. C.A. Br. 34. He argued, however, that the notice requirement was really meant for "virtual" child pornography cases and that, in the alternative, the court of ap-

peals should treat petitioner as having forfeited the affirmative defense and, thus, review should be for plain error. *Id.* at 34-36.

b. The court of appeals affirmed petitioner's child pornography convictions. Pet. App. 10a-15a. As to petitioner's first argument, the court concluded that the evidence was sufficient to establish that, in 2006, petitioner knew that his ex-wife's sister had been younger than 18 years old at the time the photographs were produced. *Id.* at 15a. As to petitioner's second argument, the court of appeals first noted that petitioner "did not raise th[is] issue in the district court." *Id.* at 11a. The court also made clear that petitioner was not now arguing that "Congress can't criminalize the continued possession of pornography that was legal when created," nor was he arguing "that because the photos of his sister-in-law were not illegal when he took them, they could not constitute sexual abuse of a minor." *Id.* at 11a, 13a-14a. Instead, the court explained, petitioner was arguing that the affirmative defense "grandfather[s] the possession of pornography that was legal when it was created." *Id.* at 11a.

The court of appeals rejected petitioner's argument, concluding that 18 U.S.C. 2252A(c) could not be read such that "anyone who happened to have pornographic photographs of 16- and 17-year-olds taken before 1984 would be free to market them." Pet. App. 14a-15a. The court reasoned that the affirmative defense under 18 U.S.C. 2252A(c) was largely irrelevant after this Court's decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). Pet. App. 13a-14a. When the affirmative defense was added to the statute in 1996, the court explained, the purpose was "to exculpate child pornography made with adult rather than child models,

at a time when the Supreme Court had not yet ruled that the making of such pornography could not constitutionally be punished, and therefore at a time when Congress thought it could place the burden of proof concerning the age of the model used in producing the pornography on the defendant rather than on the government." *Id.* at 14a. The court continued, because the government is now required to "prove beyond a reasonable doubt that the apparent child in the pornographic image is a real child, the only work left for the provision creating the affirmative defense is to require * * * that the defendant notify the government of his intention to challenge the government's proof that a child was used." *Ibid.*; *id.* at 11a-12a (noting that the government's lawyer conceded at argument "that to prove a violation of the statute [it] has to prove that a real-life minor, not a computer simulation or an adult looking like a minor, was used in the creation of the pornography"). The court of appeals thus upheld petitioner's child pornography convictions.

The court of appeals held, however, that petitioner's convictions for both bankruptcy fraud and obstruction of justice violated the Double Jeopardy Clause of the Fifth Amendment. Pet. App. 3a-10a. The court also concluded that the district court erred in its calculation of intended loss for the purpose of determining the advisory Guidelines range for those convictions. *Id.* at 15a-21a. The court of appeals therefore remanded the case to the district court with "directions that the judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. [] 3553(a)." *Id.* at 22a.

ARGUMENT

Petitioner now argues that the child pornography statute violates the First Amendment as applied to him (Pet. 7-12), and that the interpretation of the statute adopted by the court of appeals raises serious ex post facto concerns (Pet. 13-15). The court of appeals' decision is interlocutory, petitioner did not raise either of these constitutional claims below, and the court of appeals did not pass on them. Because petitioner also failed to raise either claim in the district court, they are waived or, at most, reviewable for plain error. Petitioner cannot satisfy that stringent standard and his newly asserted claims do not implicate a conflict with the decisions of this Court or any other court of appeals. Further review is not warranted.

1. As an initial matter, this Court's review of petitioner's constitutional claims is unwarranted at this time because the case is in an interlocutory posture. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (describing the interlocutory nature of a decision as "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari). The court of appeals reversed in part and remanded with "directions that the judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. [] 3553(a)." Pet. App. 22a. After the district court resentences petitioner, he will be able to raise his current claims—together with any other

claims that may arise during resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. Review is also unwarranted because petitioner never challenged his child pornography convictions on First Amendment or ex post facto grounds in the court of appeals or the district court. Accordingly, no court has passed on these constitutional questions. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed on below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). There is no reason to depart from that general rule here.

In the district court, petitioner failed to even raise the affirmative defense set forth in 18 U.S.C. 2252A(c), or give notice as required by statute. 09/11/2009 Pet. C.A. Br. 34. And, on appeal, petitioner made only the statutory interpretation argument that his child pornography convictions should be overturned because he *could have* raised a successful affirmative defense under 18 U.S.C. 2252A(c), since his ex-wife's sister was an "adult" at the time the images were produced. 09/11/2009 C.A. Br. 33-38. Whereas petitioner now claims that the First Amendment is implicated because the photographs he was convicted of possessing "have nothing at all to do with child sexual abuse, as they were taken in the course of a relationship between consenting adults," Pet. 10, before the court of appeals "[h]e d[id] not argue that because the photos of his sister-in-law were not illegal when he took them, they could not con-

stitute sexual abuse of a minor," Pet. App. 13a-14a.[2] Similarly, whereas petitioner now argues that his convictions raise ex post facto concerns because he "became subject to criminal prosecution for possessing materials that previously" were legal when Congress outlawed the possession of child pornography, Pet. 13, before the court of appeals he did "not argue that Congress can't criminalize the continued possession of pornography that was legal when created," Pet. App. 11a. Finally, whereas petitioner now argues that "it is far from clear" that the affirmative defense provisions of 18 U.S.C. 2252A(c) could save the child pornography statute from First Amendment challenge, Pet. 11, petitioner urged the court of appeals to overturn his convictions because he could have successfully raised that defense at trial, 09/11/2009 Pet. C.A. Br. 33-38.

This Court should not be the first court to review these constitutional questions. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

3. Even if this Court were to overlook petitioner's failure to raise these claims in the court of appeals, this

---

[2] In his petition for rehearing, petitioner suggested that the court of appeals' ruling conflicts with *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), since petitioner "could not have committed sexual abuse of" his ex-wife's sister "because she was above the age of consent at th[at] time." 02/26/2010 Pet. C.A. Petition for Reh'g 10-11. This Court's traditional practice, however, is "to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari), *Easley* v. *Reuss*, 532 F.3d 592, 595 (7th Cir. 2008) (issue cannot be raised for first time in rehearing petition). In any case, the rehearing petition does not even mention the First Amendment—let alone argue that petitioner's convictions were constitutionally invalid for that reason.

case does not squarely present the issues petitioner seeks to raise. Because petitioner did not raise either constitutional claim before trial or at any other time in the district court, the claims are waived. See Fed. R. Crim. P. 12(b)(3)(A)-(B) and (e); *United States* v. *Petitjean*, 883 F.2d 1341, 1344 (7th Cir. 1989) ("defenses and objections based on defects in the indictment must be raised prior to trial," "[o]therwise, they are waived"); *United States* v. *Feliciano*, 223 F.3d 102, 125 (2d Cir. 2000) (facial and as-applied constitutional challenges not raised in district court were waived on appeal), cert. denied, 532 U.S. 943 (2001).

At most, petitioner's newly asserted claims would be reviewable only for plain error. See Fed. R. Crim. P. 52(b). In order to satisfy that standard, petitioner must show that "(1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (brackets in original) (quoting *Puckett* v. *United States*, 129 S. Ct. 1423, 1429 (2009)). Petitioner cannot establish error, let alone error that is "obvious" under current law. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) ("At a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law.").

a. Petitioner argues (Pet. 7-12) that 18 U.S.C. 2252A(a)(5)(B) violates the First Amendment, as applied to him, because the 16-year-old child depicted in the photographs was actually an "adult" at the time the pic-

tures were produced—and, thus, his possession of the sexually explicit, but nonobscene, images was constitutionally protected. To reach the conclusion that his ex-wife's sister was an "adult" at the time the pictures were produced, petitioner appears to argue that (i) child pornography can only be banned consistent with the First Amendment if the images depict the crime of child sex abuse, Pet. 10-12, and (ii) the photographs in question do not involve the crime of child sex abuse because, in 1974 when the photographs were produced, the age of consent in Illinois was 16 and there was no federal child pornography law on the books, Pet. 2-3. That argument fails.

As this Court held in *New York* v. *Ferber*, 458 U.S. 747 (1982), depictions of real children engaging in sexually explicit conduct lack First Amendment protection. Petitioner nevertheless asserts that the First Amendment does protect child pornography as long as production of the underlying image was not itself a crime. If petitioner's argument were correct, the market for child pornography produced overseas, in countries where there is no age of consent (or where the age of consent is, for example, 12 years old) and where the production of child pornography is legal, would be constitutionally protected. This Court's cases provide no support for such a narrow reading of *Ferber*.

Petitioner relies on *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), but such reliance is misplaced. In that case, this Court addressed the narrow issue of whether the generally applicable criminal ban on "virtual" child pornography in the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 101(a), 110 Stat. 3009, survived constitutional scrutiny. In reaching the conclusion that the ban violated the First Amendment, the Court distinguished "virtual"

child pornography from child pornography that depicted actual children. *Free Speech Coalition*, 535 U.S. at 240. Sexually explicit materials depicting actual children can be banned even if not obscene, the Court explained, because the use of a child in the production of such material exploits the child and is itself a form of sexual abuse. *Id.* at 240, 249-250. The Court did not, however, hold that the sexual exploitation of a child occurs only when the law in effect at the time of production criminalizes the underlying act. Nor would such an approach make sense. Whether production of the images constitutes child sex abuse in that place or at that time, the continued possession and dissemination of those images remains a "permanent record of the children's participation and the harm to the child"—harm that is not restricted to then-chargeable sexual abuse. *Ferber*, 458 U.S. at 759; cf. *Free Speech Coalition*, 535 U.S. at 242 (explaining that a separate provision, which prohibited the computer alteration of innocent pictures of real children, was not challenged but would "implicate the interests of real children and are in that sense closer to the images in *Ferber*").

In any event, contrary to petitioner's suggestion (Pet. 12), the fact that petitioner's then-sister-in-law was above the age of consent in Illinois at the time the photographs were taken does not mean that petitioner's sexual relationship with a 16-year-old girl was lawful at that time. In 1974, any person age 14 or older who had sexual intercourse with "any person under the age of 18" was guilty under Illinois law of "contributing to the sexual delinquency of a child." *People* v. *Keegan*, 286 N.E.2d 345, 346 (Ill. 1971), cert. denied, 406 U.S. 964 (1972); cf. *People* v. *Beksel*, 261 N.E.2d 40, 44-45 (Ill. App. Ct. 1970) (allowing the commitment of individuals

who are "suffering from a mental disorder" and have "demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children," and defining "children" to mean people under the age of 18) (emphasis omitted).

In sum, the First Amendment does not preclude Congress from banning the possession of sexually explicit images of children under 18 that were created before 1984 in the more than a dozen states (or federal territories) where the age of consent was 16 years old. See *Ferber*, 458 U.S. at 764 n.17. Rather, only "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

b. Petitioner contends (Pet. 13-15) that his convictions "raise[] significant *ex post facto* concerns." That claim is similarly lacking in merit.

Section 2252A(a)(5)(B) does not criminalize conduct that occurred wholly before the current version of the statute was enacted. To the contrary, petitioner's convictions clearly rest on post-amendment conduct. Petitioner is being punished for his possession of child pornography in 2006—16 years after the statute was amended to criminalize the possession of child pornography involving children under the age of 18. See p. 4 n.1, *supra*. Thus, Section 2252A(a)(5)(B) does not violate the Ex Post Facto Clause because it does not "operate[] retroactively" in the sense of applying to conduct that was "completed before its enactment." *Johnson* v. *United States*, 529 U.S. 694, 699 (2000); see *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995); *Collins* v. *Youngblood*, 497 U.S. 37, 49 (1990); *Miller* v. *Florida*, 482 U.S. 423, 430 (1987).

A number of courts have thus correctly held that a conviction for the possession of child pornography does not violate the Ex Post Facto Clause, even if the defendant first obtained possession of the images prior to the effective date of the criminal prohibition. See, *e.g.*, *United States* v. *Paton*, 110 F.3d 562, 564-565 (8th Cir. 1997); *United States* v. *Bateman*, 805 F. Supp. 1053, 1055 (D.N.H. 1992); *United States* v. *Porter*, 709 F. Supp. 770, 774 (E.D. Mich. 1989), aff'd, 895 F.2d 1415 (6th Cir.), cert. denied, 498 U.S. 1013 (1990); cf. *United States* v. *Trupin*, 117 F.3d 678, 686-687 (2d Cir. 1997) (finding no ex post facto violation where defendant was prosecuted for possession of a stolen painting he acquired in 1980, before the 1986 amendment that made it a federal crime to "possess" stolen goods that have crossed state lines), cert. denied, 522 U.S. 1051 (1998); *United States* v. *Waters*, 23 F.3d 29, 36 (2d Cir.) (same with gun possession), cert. denied, 513 U.S. 867 (1994).

Contrary to petitioner's suggestion (Pet. 13-15), *United States* v. *Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), petition for cert. pending, No. 09-940 (filed Feb. 9, 2010), is inapposite. In that case, the Ninth Circuit held that the application of the registration and notification provisions of the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590, to a juvenile who was adjudicated delinquent under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.*, before SORNA's enactment violated the Ex Post Facto Clause. The defendant's juvenile adjudication which triggered the registration requirement occurred before the enactment of SORNA; the disputed issue is whether the registration and notification requirements constitute "punishment" for ex post facto purposes. See Pet. at 14-26, *Juvenile Male*, *supra* (No.

09-940), available at 2010 WL 531758. Here, in contrast, petitioner's possession of child pornography occurred after the enactment (and amendment) of Section 2252A(a)(5)(B). Even if this Court were to grant the petition for a writ of certiorari in *Juvenile Male*, that would have no bearing on the outcome of petitioner's case.[3] Accordingly, there is no reason to hold this petition pending a ruling on the *Juvenile Male* petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOHN M. PELLETTIERI
Attorney

DECEMBER 2010

---

[3] This Court certified a question of state law to the Montana Supreme Court to determine whether the case was moot, and reserved further proceedings. See *United States* v. *Juvenile Male*, 130 S. Ct. 2518 (2010). The certified question has been briefed and the case is scheduled for argument before the Montana Supreme Court in January 2011.

Supreme Court, U.S.
FILED
DEC 23 2010
OFFICE OF THE CLERK

No. 10-83

IN THE
Supreme Court of the United States

GARY E. PEEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

JEROLD S. SOLOVY*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60611
(312) 222-9350
jsolovy@jenner.com

JESSIE K. LIU
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

* *Counsel of Record*

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The Interlocutory Nature of This Case Should Not Preclude Review 2

II. Petitioner Adequately Preserved the Issues That He Seeks to Raise 4

III. This Case Squarely Presents the Issues That Petitioner Seeks to Raise 5

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 1, 4, 5, 6, 7

Michael v. United States, 454 U.S. 950 (1981) 3

New York v. Ferber, 458 U.S. 747 (1982) 6

Osborne v. Ohio, 495 U.S. 103 (1990) 6

United States v. Juvenile Male, 590 F.3d 924 (9th Cir. 2010), *petition for cert. pending*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2010) (No. 09-940) 2, 8

United States v. Williams, 504 U.S. 36 (1992) 5

STATUTES

28 U.S.C. § 1254(1) 2, 3

Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 101(a), 110 Stat. 3009-26 6

Sex Offender Registration and Notification Act, Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (2006) 9

720 ILCS 5/12-16(d) 8

38 Ill. Rev. Stat. § 11-4 (1973) 8

Ill. Pub. L. No. 83-1067, § 12-15 8

INTRODUCTION

The government's opposition reads both the record below and this Court's precedents too narrowly. First, the government urges this Court to deny review of Petitioner's constitutional claims because this case is in an interlocutory posture. But although the court of appeals reversed in part and remanded for further proceedings, Petitioner seeks to raise important and clear-cut issues of law that otherwise would qualify as a basis for certiorari and that are unrelated to the issues the lower courts will consider on remand. Therefore, the interlocutory status of this case should not preclude review.

Second, the government asserts that this Court should deny review because Petitioner failed to preserve his constitutional claims below. But in both the district court and the court of appeals, Petitioner contended, as he does now, that he could not be convicted of the child pornography offenses with which he was charged because the subject of his photographs was not a child under Illinois law at the time the pictures were taken. Moreover, the court of appeals passed on the question presented in this case, stating unequivocally that under this Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), only the presence of sexual abuse can justify, as a constitutional matter, the prohibition of non-obscene child pornography. That is an issue of exceptional national importance. Accordingly, this Court should exercise its discretion to review Petitioner's claims.

Finally, the government argues that this case does not squarely present the issues Petitioner seeks to raise. To the contrary, this case involves a direct conflict with this Court's decision in *Free Speech Coalition*, as Petitioner was convicted of possessing non-obscene pornography even though no child (and therefore no child sex abuse) was involved in the creation of the images. In addition, this case raises serious *Ex Post Facto* Clause concerns that, at the very least, warrant holding the petition for certiorari pending this Court's ruling on the petition in a similar case, *United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *petition for cert. pending*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2009) (No. 09-940).

Accordingly, this Court should grant the petition for certiorari, or at a minimum, hold the petition pending its ruling in *Juvenile Male*.

I. The Interlocutory Nature of This Case Should Not Preclude Review.

The government asserts that this Court's review of Petitioner's constitutional claims is not warranted at this time because the case is in an interlocutory posture. Br. Opp. 9-10. It points out that the court of appeals reversed in part and remanded with directions that the district court vacate either Petitioner's bankruptcy fraud conviction or obstruction of justice conviction and resentence Petitioner in accordance with its opinion. *Id.* (citing Pet. App. 22a)).

The government does not dispute, nor could it, that this Court has jurisdiction to review an interlocutory judgment of a court of appeals under 28

U.S.C. § 1254(1). Instead, it argues that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." Br. Opp. 9 (alteration in original; quoting *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., regarding denial of certiorari)). But the government fails to acknowledge that "[w]here there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review." *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting from denial of certiorari where lower court denied motion to suppress and criminal trial had not yet occurred). This is such a case.

Whether Petitioner's convictions for possession of child pornography violate the First Amendment and the *Ex Post Facto* Clause present "important" and "clear-cut" issues of law that "would otherwise qualify as a basis for certiorari," as Petitioner explains in his petition and in this reply brief. Pet. 7-17; *see infra* at 5-9. These issues are unrelated to the matters that the district court must consider on remand, and nothing that the lower courts do on remand will affect them. In contrast, if this Court were to find Petitioner's child pornography convictions unconstitutional, that would moot his resentencing on those charges, and likely also would change the calculation of his sentence on any remaining counts. For that reason, the district court ordered that proceedings on remand be stayed until

this Court rules on this petition. There is no reason to defer review of Petitioner's constitutional claims.

II. Petitioner Adequately Preserved the Issues That He Seeks to Raise.

The government next argues that the petition should be denied because Petitioner failed to raise the First Amendment and *Ex Post Facto* Clause claims before either the district court or the court of appeals. Br. Opp. 10-11. But in the district court, Petitioner referred repeatedly to the fact that his then-sister-in-law was above the age of consent at the time the photographs at issue were taken, and asserted again and again that both his relationship with her, and the pictures that he took, were legal in 1974 and for many years afterwards. Br. for Appellant at 37 (7th Cir. Sept. 11, 2009). Indeed, Petitioner even prevailed on the district court to take "judicial notice of the fact that in 1973 and 1974, the age of consent for sexual activity was 16." *Id.* Before the court of appeals, Petitioner again asserted that the district court erred in denying his motion for judgment of acquittal on the child pornography because his then-sister-in-law was not a child at the time the photographs were taken. *Id.* at 33-38. When the court of appeals rejected this argument, Petitioner filed a combined petition for rehearing and rehearing en banc arguing that the court's decision conflicted with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Petition for Reh'g at 10-11 (7th Cir. Feb. 26, 2010). That is precisely the issue that Petitioner seeks to raise before this Court.

Moreover, the court of appeals addressed the substantive First Amendment issue presented in this petition. Specifically, it stated that *Free Speech Coalition* held that "the production of non-obscene pornography in which no child was involved cannot constitutionally be prohibited, because there is no sexual abuse in such a case, and only the presence of that abuse . . . justifies the suppression of pornography that does not cross the line to obscenity." Pet. App. 13a. Thus, even if the court of appeals was correct that Petitioner did "not argue that because the photos of his sister-in-law were not illegal when he took them, they could not constitute sexual abuse of a minor," Pet. App. 13a-14a, it nonetheless passed on the constitutional issue that Petitioner seeks to raise. This Court's traditional rule "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). As this Court explicitly has recognized, "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id.* Therefore, this Court should review the important constitutional issues here.

III. This Case Squarely Presents the Issues That Petitioner Seeks to Raise.

There is no merit to the government's contention that this case does not squarely present the First Amendment and *Ex Post Facto* Clause issues that Petitioner seeks to raise. The court of appeals' decision clearly conflicts with this Court's decision in *Ashcroft v. Free Speech Coalition*, 535

U.S. 234 (2002), and raises significant *Ex Post Facto* Clause concerns that warrant this Court's review.

1. The government asserts that there is no conflict between the court of appeals' decision and *Free Speech Coalition* because that case "did not . . . hold that the sexual exploitation of a child occurs only when the law in effect at the time of production criminalizes the underlying act." Br. Opp. 14. That argument is untenable.

First, *Free Speech Coalition* makes clear that only the governmental interest in preventing child sex abuse justifies banning non-obscene sexually explicit images of young people. In that case, this Court noted that *New York v. Ferber*, 458 U.S. 747 (1982), upheld a prohibition on the production, distribution, and sale of child pornography "because these acts were 'intrinsically related' to the sexual abuse of children." *Free Speech Coalition*, 535 U.S. at 249. Subsequently, it observed, *Osborne v. Ohio*, 495 U.S. 103 (1990), held that "these same interests justified a ban on the possession of pornography produced by using children," a ruling "anchored . . . in . . . concern for the participants, those whom [this Court] called the 'victims of child pornography.'" *Free Speech Coalition*, 535 U.S. at 250. Tellingly, this Court emphasized that *Osborne* "did not suggest that, absent this concern, other governmental interests would suffice." *Id.* And applying these principles to the Child Pornography Prevention Act of 1996 ("CPPA"), Pub. L. No. 104-208, Div. A, Tit. I, § 101(a), 110 Stat. 3009-26, this Court concluded that the CPPA banned speech that was not "'intrinsically related' to the sexual abuse of children," and

therefore was unconstitutional. *Free Speech Coalition*, 535 U.S. at 250, 256.

Second, in characterizing the conduct the prevention of which would justify a ban on non-obscene child pornography, *Free Speech Coalition* speaks repeatedly in terms of crimes. For example, in discussing *Ferber*, this Court pointed out that under either of that case's two rationales for prohibiting the production, distribution, and sale of child pornography, "the speech had what the Court in effect held was a proximate link to the *crime* from which it came." *Id.* at 250 (emphasis added). Analyzing the CPPA, this Court observed that it "prohibits speech that records no *crime* and creates no victims by its production," and that although the government asserted that virtual child pornography could lead to actual child abuse, "the causal link [was] contingent and indirect," as "[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent *criminal acts*." *Id.* (emphases added). Thus, the government's suggestion that the prevention of *noncriminal* conduct can justify banning non-obscene child pornography finds no support in *Free Speech Coalition*.

In this case, it is undisputed that Petitioner's then-sister-in-law was sixteen years old, and therefore above the age of consent in Illinois, at the time that the photographs at issue were taken. Pet. 3; Br. Opp. 14. Indeed, Petitioner specifically asked the district court to take judicial notice of that fact, arguing that absent such notice, "the jury will be weighing the fate of a man it may believe committed

aggravated sexual abuse," and the district court granted Petitioner's motion for judicial notice. Pet. 3. The government now asserts that in 1974, a person over the age of fourteen years who engaged in sexual intercourse with any person under the age of eighteen years could be convicted of the misdemeanor of contributing to the sexual delinquency of a child. Br. Opp. 14. Even so, under the law of Illinois at the time, Petitioner's conduct did not constitute the sexual abuse of a child. In 1973 and 1974, Illinois law did not recognize the crime of "aggravated sexual abuse," but did criminalize as a felony "indecent liberties with a child," defined as any act of sexual intercourse with a "child under the age of 16." 38 Ill. Rev. Stat. § 11-4 (1973). It was not until 1983 that the Illinois General Assembly passed a law criminalizing "criminal sexual abuse," and even then, that offense was defined as "an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but *under 16 years* of age when the act was committed." Ill. Pub. L. 83-1067, § 12-15 (emphasis added). Therefore, even if Petitioner's conduct amounted to "contributing to the sexual delinquency of a child," it did not constitute sexual abuse, and the photographs he took of his then-sister-in-law certainly were not so "intrinsically related to the sexual abuse of children" as to justify banning them.

2. The government also asserts that *United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *petition for cert. pending*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2009) (No. 09-940), is inapposite. This argument lacks merit. In *Juvenile Male*, the United

States Court of Appeals for the Ninth Circuit held that the application of the registration and notification provisions of the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (2006), to a juvenile who was adjudicated delinquent prior to SORNA's enactment violated the *Ex Post Facto* Clause. The Ninth Circuit was troubled by the fact that, under SORNA, "individuals who *twenty or thirty years ago* pled true to acts of juvenile delinquency — and who did so with the expectation that their adjudication would remain confidential — may, decades later, be required to publicly expose that information to friends, family, colleagues, and neighbors." 590 F.3d at 935 (emphasis in original).

If anything, this case raises even more significant *Ex Post Facto* concerns. When Petitioner took the photographs at issue, he had a constitutional right under the First Amendment to possess them. The subsequent criminalization of child pornography, and the redefinition of child pornography to encompass the pictures of Petitioner's then-sister-in-law, stripped away this right and subjected Petitioner to "public humiliation and ignominy for the first time." The government's argument that *Juvenile Male* could not have any bearing on this case represents too narrow a reading of both that case and this one. At a minimum, therefore, this Court should hold this petition pending a ruling on the *Juvenile Male* petition.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a writ of certiorari or, at a minimum, hold it pending a ruling on the petition for a writ of certiorari in *United States v. Juvenile Male*, No. 09-940.

Respectfully submitted,

JEROLD S. SOLOVY*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60611
(312) 222-9350
jsolovy@jenner.com

JESSIE K. LIU
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

December 23, 2010

* *Counsel of Record*